

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of AT&T for Forbearance	)	WC Docket No. 07-139
Under 47 U.S.C. § 160(c) from Enforcement	)	
of Certain of the Commission's ARMIS	)	
Reporting Requirements	)	
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**COMMENTS AND OPPOSITION OF THE  
NEW JERSEY DIVISION OF RATE COUNSEL**

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**I. INTRODUCTION**

In response to the Public Notice issued July 20, 2007, by the Federal Communications Commission ("FCC" or "Commission"),<sup>1</sup> the New Jersey Division of Rate Counsel ("Rate Counsel") hereby opposes the petition filed June 8, 2007, by AT&T, Inc. ("AT&T") requesting forbearance under 47 U.S.C. § 160(c) from enforcement of certain of the Commission's Automated Reporting Management Information System ("ARMIS") reporting requirements.<sup>2</sup>

**A. INTEREST OF THE RATE COUNSEL IN THE INSTANT PROCEEDING.**

Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial,

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<sup>1</sup> / Federal Communications Commission Public Notice, "Pleading Cycle Established for AT&T Inc. Petition on behalf of its Incumbent LEC Affiliates Seeking Forbearance from Enforcement of Certain ARMIS Reporting Requirements," WC Docket No. 07-139, DA 07-3332, July 20, 2007. Reply comments are due September 19, 2007.

<sup>2</sup> / Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain of the Commission's ARMIS Reporting Requirements, filed June 8, 2007 ("AT&T Petition").

and industrial entities.<sup>3</sup> Rate Counsel participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to Rate Counsel's continued participation and interest in implementation of the Telecommunications Act of 1996. The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will "promote efficiency, reduce regulatory delay, and foster productivity and innovation" and "produce a wider selection of services at competitive market-based prices." As these comments demonstrate, if granted, AT&T's request for forbearance from reporting requirements would unnecessarily and unduly constrain the ability of Rate Counsel and state regulators to compare and to assess the quality of Verizon's services in New Jersey with the quality of the comparable services of another Bell operating company ("BOC") or other incumbent local exchange carrier ("ILEC"). Also, if granted, AT&T's petition would limit access to important public information about operating statistics and network infrastructure.

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<sup>3</sup> / Effective July 1, 2006, the New Jersey Division of Ratepayer Advocate is now the New Jersey Division of Rate Counsel. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman's Reorganization Plan. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A. §§ 52:27EE-1 et seq.*). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest," *N.J.S.A. § 52:27EE-57, i.e.*, an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens." *N.J.S.A. § 52:27EE-12*, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers.

Although New Jersey ratepayers do not reside or work in AT&T's "home region," the Commission's deliberations in this proceeding affect New Jersey households and businesses because, among other things:

- ARMIS data provides a valuable tool to state and federal regulators for benchmarking. For example, as is discussed below, Rate Counsel has compared AT&T's and Verizon's service quality performance to develop recommendations for improving mass market consumers' service quality in New Jersey. Therefore, AT&T's petition bears directly on Rate Counsel's ability to protect New Jersey consumers.
- ARMIS data provides a public source of information. Information about BOC operations is important to ensure that the market place works efficiently, consumers have open access to information, and regulators can detect where consumers are receiving sub-par levels of quality for basic service.
- The petition, if granted, would set an ill-advised precedent, paving the way for a "me-too" petition by Verizon, potentially jeopardizing consumers' and regulators' access to public information.
- The petition, if granted, also would set an unfortunate precedent for forbearance requests. The piecemeal granting of petitions whittles away inappropriately at long-established policy in a context that is inappropriately narrow. If the Commission is considering revamping its reporting requirements, it should assess such measures through a broader rulemaking proceeding in which it can address comprehensively the wide-ranging implications of such changes for state regulators, consumers, and competitors.

Rate Counsel has previously opposed a petition filed by BellSouth Telecommunications, Inc. (“BellSouth” or “BST”) for forbearance under 47 U.S.C. § 160 from enforcement of certain of the Commission’s cost assignment rules,<sup>4</sup> before AT&T acquired BellSouth,<sup>5</sup> and refers the Commission to Rate Counsel’s initial and reply comments, which opposed BellSouth’s earlier petition, because many of Rate Counsel’s arguments regarding the 2005 BellSouth petition are germane to this proceeding.<sup>6</sup>

## **B. SUMMARY OF COMMENTS**

AT&T fails to demonstrate that its Petition satisfies the Commission’s well-established three-prong test for forbearance. Furthermore, it is entirely inappropriate to up-end a comprehensive system of reporting, upon which both federal and state regulators rely, through a petition submitted by a single regional Bell operating company (“RBOC”) for forbearance. Also, AT&T’s Petition bears directly on states’ access to valuable data and information, and, therefore, the Commission’s deliberations in this

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<sup>4</sup> / On December 6, 2005, BellSouth filed a petition for forbearance pursuant to section 10 of the Communications Act of 1934, as amended (“Act”) from the Commission’s cost allocation rules. Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160 From Enforcement of Certain of the Commission’s Cost Assignment Rules, WC Docket No. 05-342. On January 25, 2007, AT&T filed a petition for forbearance pursuant to section 10 of the Act from the Commission’s cost allocation rules. Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160 from Enforcement of Certain of the Commission’s Cost Assignment Rules, WC Docket No. 07-21. On February 9, 2007, AT&T, on behalf of BellSouth, withdrew the petition filed in WC Docket No. 05-342 and re-filed the BellSouth petition in WC Docket No. 07-21. Comments and reply comments were filed March 19, 2007 and April 9, 2007, respectively. The Commission has taken no further action in the proceeding.

<sup>5</sup> / *In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, WC Docket No. 06-74 December 29, 2006, rel. March 26, 2007 (“AT&T/BellSouth Merger Order”). AT&T and BellSouth merged on December 29, 2006. “AT&T and BellSouth Join to Create a Premier Global Communications Company,” December 29, 2006, [www.att.com](http://www.att.com).

<sup>6</sup> / Rate Counsel submitted initial and reply comments on January 23, 2006, and February 10, 2006, respectively, opposing BellSouth’s petition. Petition of BellSouth Telecommunications, Inc. For Forbearance Under 47 U.S.C. §160 from Enforcement of Certain of the Commission’s Cost Assignment Rules, WC Docket No. 05-342. Rate Counsel submitted comments on March 15, 2007 opposing the petitions for forbearance in WC Docket No. 07-21. In those comments, the Rate Counsel referred the Commission to its initial and reply comments filed in Docket No. 05-342 and supported the positions of the National Association of State Utility Consumer Advocates (“NASUCA”) as to why the grant of the petition is not in the public interest.

proceeding could affect states' ability to carry out their regulatory responsibilities. As has been the Commission's long tradition, states and the Commission should work collaboratively on matters of importance to interstate and intrastate regulation and oversight of telecommunications services and infrastructure. Finally, the Petition raises matters that potentially affect all ILECs, and, therefore, these matters would be aired more appropriately in a rulemaking informed by the recommendations of a federal-state joint board.

Despite the Rate Counsel's serious misgivings about the fundamentally inappropriate forum in which AT&T's Petition is being considered, Rate Counsel provides a preliminary assessment of AT&T's Petition in these initial comments. Based on its preliminary review, Rate Counsel concludes that the Petition is contrary to the public interest, procedurally flawed, and should be denied.<sup>7</sup>

## **II. ANALYSIS OF PETITION**

### **Overview of reports for which AT&T seeks forbearance.**

AT&T seeks forbearance from four ARMIS reports: 43-05 (Service Quality Report), 43-06 (Customer Satisfaction Report), 43-07 (Infrastructure Report), and 43-08 (Operating Data Report). These are described briefly below:<sup>8</sup>

#### *ARMIS Report 43-05, Service Quality Report:*

The Service Quality Report was a quarterly service quality report through 1995. Beginning in 1996, the report has been and continues to be filed annually. All price cap

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<sup>7</sup> / Based on its review of others' filings in this proceeding, Rate Counsel may supplement the concerns and analyses set forth in this opposition.

<sup>8</sup> / A description of the ARMIS reports and instructions to carriers can be found on the FCC's website at <http://www.fcc.gov/web/armis/instructions/>.

LECs (both mandatory and elective) must file.<sup>9</sup> The 43-05 data is filed at the study area (jurisdiction) and the holding company levels. The following tables are included in ARMIS Report 43-05:

- Table I Installation and Repair Intervals (Interexchange Access) contains the installation and repair intervals achieved by the reporting carriers for services provided to interexchange carriers. The data is segregated between switched access and special access services.
- Table II Installation and Repair Intervals (Local Service) covers the installation and repair intervals achieved by the reporting carriers for local services they provide to both business and residential customers.
- Table III Common Trunk Blockage reports blockages on common trunk groups between the local exchange carrier's end office and the access tandem.
- Table IV Total Switch Downtime summarizes the loss of local switch call processing capability, including identification of total downtime durations of less than two minutes.
- Table IV(A) Occurrences of Two Minutes or More Downtime provides details of all occurrences of local switch outages of two or more minutes duration.
- Table V Service Quality Complaints is a count of the formal complaints raised by residential and business customers in the state and interstate jurisdictions.

*ARMIS Report 43-06 Customer Satisfaction Report:*

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<sup>9</sup> / Carrier filings requirements are summarized on the FCC's website at <http://www.fcc.gov/wcb/armis/filereqt.html>. No ARMIS reports are required of the approximate 1200 small companies with annual revenues below the current threshold of \$129-million in annual revenues. *See, also*, 47 U.S.C. § 43.21.



The Customer Satisfaction Report was a semiannual service quality report through 1995, and since 1996, the report has been an annual report. All mandatory price cap ILECs must file Report 43-06. Report 43-06 is filed at the study area (jurisdiction) and the holding company levels. The following table is included in ARMIS Report 43-06:

- Table I Summary Customer Satisfaction Survey contains the results of customer satisfaction surveys. Through 1993, Table I reported customer satisfaction. Beginning in 1994, Table I reports the percentage of customers that are dissatisfied with various aspects of the reporting carrier's service.

*ARMIS Report 43-07 Infrastructure Report:*

The Infrastructure Report provides data regarding the infrastructure of the reporting carrier. All mandatory price cap LECs must file Report 43-07. Report 43-07 is filed at the study area (jurisdiction) and the holding company levels. The following tables are included in ARMIS Report 43-07:

- Table I Switching Equipment provides quantities of local switches according to type, e.g., electromechanical or digital stored program control, and by capability, e.g., equal access and ISDN. Table I also provides counts of access lines served by the various switch types and capabilities.
- Table II Transmission Facilities contains information on interoffice facilities and loop plant, with categories for copper, fiber, analog and digital carrier, and radio technologies.

*ARMIS Report 43-08 Operating Data Report:*

The Operating Data Report contains statistical schedules that were formerly reported in Form M. All of the tables in Report 43-08 are organized by state jurisdiction, and each report only covers the reporting carrier's totals for that state. All ILECs whose annual revenues exceed the \$129-million annual revenue threshold must file Report 43-08.<sup>10</sup> Report 43-08 is filed on an operating company basis. The following tables are included in ARMIS Report 43-08:

- Table I.A - Outside Plant Statistics - Cable and Wire Facilities contains various cable and wire facility statistics by state.
- Table I.B - Outside Plant Statistics - Other contains various outside plant statistics.
- Table II - Switched Access Lines in Service contains counts of central office switches and switched access line statistics by state.
- Table III - Switched Access Lines in Service by Customer contains switched and special access line statistics by state.
- Table IV - Telephone Calls contains telephone call statistics by state.

As Rate Counsel demonstrates in these comments, the data and information contained in these reports continue to be useful to the FCC and state regulators and cannot be otherwise obtained by regulators except through the burdensome and sporadic process of issuing data and information requests in regulatory proceedings.

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<sup>10</sup> / Elective and mandatory price cap carriers below the \$129-million annual revenue threshold are not required to file Report 43-08. Non-price cap ILECs, elective price cap ILECs and mandatory price cap ILECs at or above the threshold must file. Carrier filings requirements are summarized on the FCC's website at <http://www.fcc.gov/wcb/armis/filereqt.html>. No ARMIS reports are required of the approximate 1200 small companies with annual revenues below the current threshold of \$129-million in annual revenues. *See, also*, 47 U.S.C. § 43.21(j).

**AT&T has failed to demonstrate that the burden of filing ARMIS reports outweighs the benefit of standardized, public, nationwide data about ILEC operations.**

AT&T contends that the ARMIS reports are “burdensome and anachronistic.”<sup>11</sup> AT&T has failed, however, to demonstrate that the purported burden of submitting ARMIS reports to the FCC outweighs the significant benefit to regulators and consumers of having standardized public information. There is substantial value of having nationwide publicly available service quality data for basic telephone service, particularly at a time when ILECs’ are ignoring POTS customers and instead are pursuing higher-revenue “triple play” customers.<sup>12</sup> For example, in an ongoing proceeding before the New Hampshire Public Utilities Commission (“PUC”), service quality data that Verizon NH submits to state regulators is afforded proprietary treatment.<sup>13</sup> In stark contrast, the New Hampshire PUC and the general public can consider and review ARMIS-based service quality data and analyses on a public basis, not only for Verizon’s operations in New Hampshire, but also, for the vast majority of local lines throughout the country. Furthermore, such information is filed regularly with the FCC. Information is essential to a well-functioning market as well as in a market under transition so that consumers and competitors can make informed decisions, and so that regulators can assess if and where regulatory safeguards are necessary to yield basic local service offered at just and

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<sup>11</sup> / Petition, at 2.

<sup>12</sup> / Appendix 1, “The Cable-Telco Duopoly’s Deployment of New Jersey’s Information Infrastructure: Establishing Accountability,” Susan M. Baldwin, Sarah M. Bosley and Timothy E. Howington, Prepared for the Public Advocate of New Jersey, January 19, 2007 (“Duopoly White Paper”), see e.g., *id.*, at 48-54

<sup>13</sup> / See, e.g., Local Exchange Carriers Quality of Service Reporting, New Hampshire Public Utilities Commission DT 02-105, Order Nisi (sic) Regarding Quality of Service Reporting, *Order No. 24,156*, April 11, 2003; Verizon New England Inc., Bell Atlantic Communications Inc., NYNEX Long Distance Company, Verizon Select Services Inc. and FairPoint Communications, Inc. Joint Petition for Authority to Transfer Assets and Franchise to FairPoint Communications, Inc., Prefiled Direct Testimony of Susan M. Baldwin on behalf of New Hampshire Office of Consumer Advocate, New Hampshire Public Utilities Commission Docket No. DT 07-011, July 31, 2007, at Section VI.

reasonable rates and acceptable levels of service quality. As is demonstrated later in these comments, many consumers are experiencing *deteriorating* service quality, which can be detected, in part, by analyzing ARMIS data about service quality and consumer satisfaction, provided in ARMIS Reports 43-05 and 43-06, respectively.

AT&T contends that “experience has confirmed beyond doubt that price caps and the powerful market forces that appropriately discipline the behavior of all providers in today’s robustly competitive marketplace work precisely as the Commission expected, obviating any conceivable justification for continuing to impose these onerous ARMIS reporting requirements on a small subset of ILECs and on *none* of their cable, CLEC, wireless or other competitors.”<sup>14</sup> Contrary to AT&T’s assertion, robust competition for POTS simply does not exist, and indeed, there are numerous flaws with AT&T’s arguments as the following sections demonstrate.

**ILECs continue to dominate the market.**

Contrary to AT&T’s depiction of a “robustly competitive marketplace,” viewed solely on a retail basis, the ILECs have an 83% market share.<sup>15</sup> Moreover, ILECs dominate the vast majority of the local market either directly through their own retail services or indirectly by leasing wholesale facilities to their competitors (*i.e.*, the non-facilities-based competition that occurs through resale, unbundled network element platform (“UNE-P”), UNE loop, and most recently, the wholesale products that have replaced UNE-P, such as Verizon’s “Wholesale Advantage” product). As Table 1 shows,

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<sup>14</sup> / Petition, at 2 (emphasis in original).

<sup>15</sup> / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2006*, (January 2007), at Table 1. *See, also, id.*, at Tables 10 and 11.

ILECs own or control 94% of the end-user switched access lines nationally as of June 30, 2006.<sup>16</sup>

**Table 1<sup>17</sup>**

<b>Incumbent LECs own or control 94% of the end-user switched access lines as of June 30, 2006</b>	
<i>Total incumbent lines</i>	142,249,668
<i>Total CLEC lines</i>	29,782,241
<i>Total end-user switched access lines</i>	172,031,909
<i>CLEC share of end-user switched access lines</i>	17%
<i>CLEC resold lines</i>	6,549,343
<i>CLEC UNE lines</i>	12,545,854
<i>CLEC-owned lines</i>	10,687,073
<i>Total CLEC lines</i>	29,782,270
<i>CLEC-owned lines as a percent of all lines</i>	6%
<i>Percent of all lines owned or controlled by incumbent</i>	94%

Nationwide, UNE-P provision reported by ILECs declined 51% from a peak in June 2004 to June 2006.<sup>18</sup> The decline in competition based on UNE-P may lead to a leveling off, or reversal, of the portion of the trend associated with customer migration from incumbents to other carriers for the provision of telephone lines, particularly for the residential local market. The dramatic decline in UNE-P lines contrasts sharply with

<sup>16</sup>/ Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2006*, (January 2007), at Table 10 and 11.

<sup>17</sup> / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2006*, (January 2007), at Table 10 and 11.

<sup>18</sup> / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2006*, (January 2007), at Table 4. Specifically, UNE-P declined from approximately 17.1 million lines in June of 2004 to 8.4 million lines in June of 2006 nationwide. *Id.* ILECs reported a 22% decline in the number of UNE-P lines they provided to unaffiliated carriers from January to June 2006. *Id.*, at 2.

UNE-P's former importance as a mode of entry for competitive suppliers.<sup>19</sup> Furthermore, the position of CLECs negotiating access to UNE-P facilities is now seriously weakened due to the expiration of regulated UNE-P access in March 2006.<sup>20</sup>

The declining prospect for robust wireline competition and the impact of the expiration of access to UNE-P are evidenced by the decision of MCI and AT&T (two of the largest CLECs) to throw in the towel and merge with RBOCs. In its 2004 Annual Report, MCI made the following representation to its investors:

As a participant in the competitive local telecommunications industry in the United States, we rely on the networks of established telephone companies or those of competitive local exchange carrier for some aspect of transmission. Federal law requires most of the established telephone companies to lease or "unbundle" elements of their networks and permit us to purchase the call origination and call termination services we need, thereby decreasing our operating expenses. However, as a result of recent litigation concerning portions of the FCC's Triennial Review Order that required the unbundling of switching, which is a critical component of UNE-P, the FCC has determined that beginning in 2006, certain discounts provided to us by the established telephone companies will cease. We are continuing to evaluate how the anticipated rise in UNE-P access costs will impact our ability to profitably provide Mass Markets subscription services, and the cost increase may force us to withdraw from certain markets. As a result, new local account installations and revenue may decrease from current levels in future periods. These regulatory changes will also increase costs for our other business segments as well and could adversely affect our competitive position in these segments.<sup>21</sup>

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<sup>19</sup> / As legacy MCI explained: "Once it became likely that UNE-P would no longer be available, the limited UNE-L buildout strategy no longer made sense. This is true even in those wire centers where MCI has a relatively high concentration of existing UNE-P customers, because the potential profits from any UNE-L plans or proposals reviewed by MCI were subject to great uncertainty and depended upon certain assumptions, including reductions in the nonrecurring charge for hot cuts, that were not realized. Therefore, MCI decided not to pursue this UNE-L strategy anymore." *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75, Application for Transfer of Control, March 11, 2005, Appendix 1: Public Interest Statement, Declaration of Wayne Huyard (Verizon/MCI), at para. 15.

<sup>20</sup> / *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC WC Docket No. 04-313; CC Docket No. 01-338, *Order on Remand*, Rel. February 4, 2005 ("UNE Remand Order" or "TRRO").

<sup>21</sup> / MCI, Inc. Form 10-k, Annual Report for the fiscal year ended December 31, 2004, at 17.

During the FCC's review of the Verizon/MCI merger, the Applicants repeatedly suggested that MCI's business was declining and that MCI was not a competitor for Verizon's mass-market voice services.<sup>22</sup> Yet, AT&T and MCI were the largest CLECs competing with Verizon for mass market customers, which begs the question: if MCI and AT&T can't compete, who can? Finally, the FCC's Industry Analysis and Technology Division estimates that a full 56% of the facilities-based lines served by CLECs are provided over coaxial cable connections (which would represent approximately 3 percent of all lines).<sup>23</sup> This also demonstrates that the RBOC estimates of increasing cable competition is already captured in the Local Competition Report and Table 1 above, and that cable competition is still fairly minimal in terms of a percentage of all telephone lines. Clearly, competitive alternatives for affordable basic local service are de minimus.

**Intermodal alternatives do not constrain ILECs' market power in the local market.**

Furthermore, contrary to AT&T's assertion, intermodal alternatives do not constrain BOCs' market power. As Section 2.4.5 of Appendix 1 demonstrates, wireless, cable, and voice over Internet protocol ("VoIP") do not constrain BOCs' monopoly power in providing basic local exchange service. Intermodal alternatives, although they can be substitutes for *additional* residential lines and also for high-volume *bundled* offerings, are not economic substitutes for basic local exchange service and therefore do not constrain either the rates or quality of basic service. The Commission should use caution when considering even facilities-based VoIP services (*i.e.*, cable telephony) as a

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<sup>22</sup> / Verizon Communications, Inc. and MCI, Inc. Applications for Approval of Transfer of Control, FCC WC Docket No. 05-75, Application for Transfer of Control, March 11, 2005, Appendix 1: Public Interest Statement, at 49 and Declaration of Robert W. Crandall and Hal J. Singer, at para. 33.

<sup>23</sup> / Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Local Telephone Competition: Status as of June 30, 2006*, (January 2007), at 2.

substitute to wireline services for residential consumers for at least two reasons. First, cable telephony typically does not work during power failures.<sup>24</sup> Second, the competitive threat faced by the telephone companies is in the provision of *bundles* of services (often referred to as the “triple play”, *i.e.* phone, video, and Internet access). Such services are usually more expensive than a single, local wireline connection that low-income or elderly consumers may require.<sup>25</sup> For example, Comcast advertises bundle discounts on its website. A customer subscribing to Comcast Digital Voice faces a price of \$44.95 per month. Subscribing to either cable or high-speed Internet access also face a price of \$44.95. A customer subscribing to cable and high-speed Internet access can receive

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<sup>24</sup>/ Time Warner Cable provides the following FAQ on its website: “Q: Can I call 911 using Digital Phone? A: Yes, absolutely. Safety is an important consideration and enhanced 911 service is provided. *Please note that Digital Phone Service does not include back-up power and, as is the case with a cordless phone, should there be a power outage, Digital Phone Service, including the ability to access 911 services, will not be available until the power is restored.*” (emphasis added) Available at: <http://www.timewarnercable.com/CustomerService/FAQ/TWCFaqs>. Comcast makes the following statement on its website: “In addition, 911 service will not function if Comcast Digital Voice service is interrupted for any reason such as failure of your eMTA, incorrect configuration of your eMTA, a power outage at your home and/or on our network, failure of our network or facilities, or suspension or disconnection of your Comcast Digital Voice service because of nonpayment.” <http://www.comcast.com/Customers/FAQ/FaqDetails.aspx?Id=3035>. Comcast makes the following statement in its FAQ section of its website: Are there any limitations of the 911/E911 service that Comcast Digital Voice® service provides? Yes. If you move the modem or eMTA (embedded Multimedia Terminal Adapter) used with Comcast Digital Voice® service and you do not register the new service address with Comcast, your 911 calls may be directed to the wrong emergency authorities, or the wrong address may be transmitted with your 911 call. In addition, 911 service will not function if Comcast Digital Voice service is interrupted for any reason such as failure of your eMTA, incorrect configuration of your eMTA, a power outage at your home and/or on our network, failure of our network or facilities, or suspension or disconnection of your Comcast Digital Voice service because of nonpayment. Comcast offers a battery backup with its Digital Voice Service and, in the event of a power outage at your home, the battery should power the eMTA for up to several hours. (It is also important to keep in mind that many cordless telephones will not work during a power outage.) Therefore, you may want to have one telephone that does not need to be plugged into an electrical outlet. See <http://www.comcast.com/Customers/FAQ/FaqDetails.aspx?Id=3035> (accessed June 26, 2007).

<sup>25</sup>/ For example, the Time Warner Cable website includes the following language in its FAQ section: Q: Do I have to subscribe to other services from Time Warner Cable to get Digital Phone Service? A: No. Time Warner Cable offers Digital Phone service in a majority of communities in our service areas. If you subscribe to Video and High-Speed Online services from Time Warner Cable, you’ll pay just \$39.95 per month for Digital Phone. If you subscribe to Video or High-Speed Online service from Time Warner Cable you’ll pay just \$44.95 per month for Digital Phone. If you only subscribe to Digital Phone service from Time Warner Cable, you’ll pay just \$49.95 per month for Digital Phone service. See, <http://www.timewarnercable.com/CustomerService/FAQ/TWCFaqs>.



phone service for \$39.95 a month.<sup>26</sup> To qualify for a rate that is more comparable to a typical wireline rate, cable telephony customers typically must also subscribe to, and pay for, an entire bundle of services they may not need or desire.<sup>27</sup> Cable companies primarily compete on the basis of bundled pricing. Therefore, the competition among the Bells and cable providers appears to be for the “high value” triple play customer, not the customer who only wants a low-cost basic exchange telephone line. Furthermore, this emerging rivalry between companies which seek to offer customers bundles of video, data, and voice, represents at best a duopoly. As Appendix 1 to these comments comprehensively demonstrates, a duopoly is not an effective form of competition for either basic customers or for customers seeking advanced services.

The Commission should certainly not give much weight to “over the top” VoIP alternatives. The product supplied by Vonage, for example, requires that subscribers provide their own broadband Internet access. In its *Verizon/MCI Merger Order*, the FCC excluded over-the-top VoIP services from the relevant product market and confirmed that decision earlier this year in its Order approving the merger of AT&T and BellSouth.<sup>28</sup> In so doing, the Commission noted that the various over-the-top services:

. . . differ significantly in their service characteristics, including quality of services and price. The extent to which consumers view these services as

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<sup>26/</sup> See, [www.comcast.com](http://www.comcast.com) (accessed June 26, 2007). The voice only product is \$44.95, plus a fee of \$3 for a modem if the customer doesn’t already have Internet service through Comcast, for a total of \$47.95.

<sup>27/</sup> The FCC noted at footnote 268 of its *Verizon/MCI Merger Order* that the average monthly household expenditure for billed wireline local telephone service is \$37. Of course, rates vary widely among states for a plethora of reasons and many households subscribe to discretionary services. A basic exchange line that provides access to the network, but no bells and whistles will be substantially less. Thus, the cable telephony option will not be price-competitive for the consumer seeking a bare-bones service that provides access to the public switched telephone network.

<sup>28/</sup> *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, FCC WC Docket No. 05-75, *Memorandum Opinion and Order*, Rel. November 17, 2005 (“*Verizon/MCI Merger Order*”), at para. 89; *AT&T/BellSouth Merger Order*, at para. 94.

substitutes for traditional wireline local service may vary based on these differences. In addition, the requirement that a customer have broadband access to be able to use certain over-the-top VoIP services affects the substitutability of those services with wireline local services.<sup>29</sup>

Regarding the issue of broadband access, the FCC noted that such a requirement made substitution “uneconomical” and further concluded that even those consumers who already subscribed to broadband services may still not be willing to view over-the-top services as substitutes depending on “the attributes of the service and the consumer’s willingness to trade off service characteristics for lower prices.”<sup>30</sup>

Wireless telecommunications services indisputably are prevalent. Yet, evidence suggests that consumers are not “cutting the cord” (*i.e.*, subscribing to wireless service in lieu of wireline service). Indeed, earlier this year, Tom Tauke, Verizon Communications, Inc. executive vice president of public affairs, policy and communications, in discussing Verizon’s proposal for universal service reserve auctions in high-cost areas, stated that a reason for having both a wireline and wireless subsidy recipient is that “most consumers in America today would like to have access to wireline voice as well as wireless voice, that they really think both are important and critical.”<sup>31</sup> In its order approving the merger of AT&T and BellSouth, the Commission concluded that approximately six percent of households rely on wireless services for all of their telecommunications needs (*i.e.*, six percent have “cut the cord”).<sup>32</sup> The Commission also cited its prior conclusion that “the record does not present credible evidence that mobile wireless services have a price

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<sup>29</sup>/ *Verizon/MCI Merger Order* (cite omitted), at para. 89.

<sup>30</sup>/ *Id.*

<sup>31</sup> / *Telecommunications Reports, State NewsWire*, “Verizon calls for broadband inventory, USF ‘reverse auction,’” February 13, 2007.

<sup>32</sup>/ *AT&T/BellSouth Merger Order*, at para. 96.

constraining effect on all consumers' demand for primary line wireline services.”<sup>33</sup> In addition, the Commission observed that the “average cost for mobile wireless services appears to be higher than for wireline local service”<sup>34</sup> which “may not make it price competitive for consumers.”<sup>35</sup> The RBOCs' own filings in recent merger proceedings before the FCC suggest that even the carriers themselves view wireline and wireless services as complements, rather than perfect substitutes. One of reasons for the SBC and AT&T merger touted by the Applicants was the simplified governance of Cingular and the facilitation of “the merged firm's ability to *jointly market wireline and wireless services to mass market and business customers.*”<sup>36</sup> The RBOCs offer bundles which include wireline and wireless services together in one package, providing further evidence that wireless is viewed, even by the carriers themselves, as a complement, rather than substitute, to wireline service.

As the above discussion comprehensively demonstrates, AT&T's description in its Petition of a “market dominated by cable providers, wireless carriers, and VoIP providers”<sup>37</sup> is simply ludicrous. Certainly, intermodal competition provides some level of discipline at the edge of the market and in certain segments of the market, but the

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<sup>33</sup>/ *Id.*, at fn 273, citing SBC/AT&T Merger Order at fn 276.

<sup>34</sup>/ *Id.*, at para. 95.

<sup>35</sup>/ *Id.*, at fn 275.

<sup>36</sup>/ *In the Matter of BellSouth Corporation and AT&T Inc. Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T Inc.*, WC Docket No. 06-74, Application for Consent of Transfer of Control, filed March 31, 2006, Declaration of Dennis W. Carlton and Hal S. Sider at para. 10 (emphasis added). *See, also, Id.*, at para. 52, stating “The proposed transaction eliminates impediments to developing innovating marketing strategies involving wireless services. Such bundles enable customers to have a single point of contact for a broader range of services.”

<sup>37</sup> / Petition, at 7.

Commission should not solely rely upon this minimal competition to replace regulatory oversight and reporting requirements.

The Commission should unequivocally reject AT&T's rhetoric regarding purported "robust" competition. Furthermore, if such competition existed, one would expect basic local service quality to increase or rates to decline or both. AT&T provides no empirical evidence of either, and there is ample information instead demonstrating that service quality for basic local service has been declining.

Section 3.10 of Appendix 1, attached to these comments, shows that AT&T's performance *in Illinois* is better than Verizon's service quality in New Jersey, and also shows that AT&T's service quality has been improving in Illinois. However, the reason for this improvement is not market forces, but rather a long history of state regulatory oversight and financial penalties for service quality deterioration. By contrast, in the AT&T-served state of Kansas, service quality, as measured by initial out of service intervals, repeat out of service intervals, and average installation intervals, has declined significantly in recent years. After reaching its best mark in 2000, at 15.3 hours, Southwestern Bell – Kansas' initial out of service interval nearly doubled to 28 hours in 2004 (and was 28.1 hours in 2005), before declining slightly in 2006. A similar pattern emerged for correcting repeat problems in Kansas. Also, after requiring *less than one day* to respond to calls for initial telephone service installation from 1996 to 2000, this metric jumped to nearly 2 days in 2001 and 2002, and to *more than two days* from 2003 to 2005. Although the average installation interval declined slightly in 2006, to 1.9 days,

it remained well above historic levels.<sup>38</sup> ARMIS reports are essential to monitor and to address ILECs' service quality deterioration.

Rate Counsel's preliminary analysis of AT&T's service quality (which the availability of ARMIS data makes possible) shows other examples of AT&T's service quality decline, which undermines entirely AT&T's rosy view of the market. For example, other problem areas for AT&T include: initial out of service intervals for Pacific Bell – California, BellSouth – Alabama; repeat out of service intervals for Pacific Bell- California; average installation intervals for Southwestern Bell – Missouri; and percent of commitments met for Illinois Bell, Michigan Bell, Indiana Bell, and Ohio Bell. ARMIS data allow analysts and regulators to identify specific service quality deficiencies like these, and to hold BOCs accountable.<sup>39</sup> Therefore, it would be entirely adverse to the public interest to grant AT&T's Petition.

**State regulators continue to seek ways to establish incentives for ILECs to improve deteriorating service quality, which undermines AT&T's assertion that service quality is improving.**

AT&T asserts that the "Commission's predictive judgments in 1990 that incentive regulation would increase service quality and spur investment in infrastructure consistently have been proven correct year after year."<sup>40</sup> Despite AT&T's rhetoric, state commissions continue to adopt service quality penalties and integrate service quality factors into price cap and alternative regulation plans for carriers precisely because service quality problems abound. For example, in 2005, the Vermont Public Service

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<sup>38</sup> / FCC, ARMIS Report 43-05, Table II "Installation and Repair Intervals (Local Service)."

<sup>39</sup> / *Id.*

<sup>40</sup> / Petition, at 5.

Board (“PSB”) adopted a new AFOR plan for Verizon Vermont in which it retained its Service Quality Plan.<sup>41</sup> Verizon Vermont had proposed to eliminate the plan, arguing that there was a sufficient degree of competition in the market to justify such a decision.

The Vermont PSB found that:

Existing and future competition for local exchange service and other telecommunications services alone will not substitute for a regulated approach to retail service quality . . . The existence of competitive alternatives alone will not necessarily substitute for service quality standards. Moreover, Verizon’s performance over the last five years belies its assertion that competition is sufficient to protect service quality. Competition has clearly increased during this period, yet Verizon’s service quality performance deteriorated. Unless we accept the premise that consumers must accept lesser service quality in a competitive market, which we do not, we can only explain this dichotomy by inferring that competition does not provide adequate restraint . . . As the Department points out, most of the New England states have imposed a set of service quality standards that include predetermined penalties or customer credits for service quality failures. The Service Quality Plan that we adopt is consistent with these other programs. We conclude that Vermont’s status as a relatively small part of Verizon’s territory requires a service quality plan with significant penalty dollars attached in order to achieve its purpose of maintaining adequate service quality. Unless the plan contains a strong incentive for Verizon to keep its service quality high, there is too much risk that Verizon will not take steps to preserve service quality and treat the payments as a cost of doing business.<sup>42</sup>

Similarly, despite granting pricing flexibility for many of Verizon Maine’s retail services, in 2001 the Maine Public Utilities Commission (“PUC”) retained Verizon Maine’s Service Quality Index (“SQI”) and, in fact, increased the total number of indices and the amount of the potential penalty faced by the company.<sup>43</sup> The PUC found that precisely

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<sup>41</sup> / *Investigation into a Successor Incentive Regulation Plan for Verizon New England Inc., d/b/a Verizon Vermont*, State of Vermont Public Service Board Docket No. 6959, *Order*, September 26, 2005.

<sup>42</sup> / *Id.*, at 130-131.

<sup>43</sup> / *Maine Public Utilities Commission Investigation into Bell Atlantic-Maine’s Alternative Form of Regulation*, State of Maine Public Utilities Commission Docket No. 99-851, *Order (Part 1)*, May 9, 2001.

because Verizon Maine had gained a reduction in regulation, the SQI should be retained.<sup>44</sup> The Massachusetts Department of Telecommunications and Energy (“DTE”) adopted a service quality rebate, or credit, in 2003.<sup>45</sup> In adopting the plan, the Massachusetts DTE stated:

Although Verizon is no longer subject to price cap regulation, competition for some customers may introduce a financial incentive for the regulated entity to reduce costs by reducing service quality to other customers, so we conclude that there should continue to be some form of protection against a reduction in service quality.<sup>46</sup>

This is precisely the situation for many price cap LECs throughout the country. Price cap LECs have the incentive to reduce the costs required to serve the basic local exchange customer and instead focus service quality efforts in competitive exchanges or in bundled services (i.e., the high margin “triple play” customer). Indeed, in Verizon Communications’ second quarter 2006 Investor Quarterly, Ivan Seidenberg, Verizon’s chairman and CEO is quoted as stating: “Verizon Telecom is tightly controlling costs in traditional businesses as we make the fiber network investments to accelerate growth and market expansion.”<sup>47</sup> Despite the regulatory changes undertaken at the federal and state level, regulators have continued to view service quality as an integral part of the regulatory regime.

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<sup>44</sup> / *Maine Public Utilities Commission Investigation into Bell Atlantic-Maine’s Alternative Form of Regulation*, State of Maine Public Utilities Commission Docket No. 99-851, *Order (Part 2)*, June 25, 2001, at 39.

<sup>45</sup> / *Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England, Inc. d/b/a Verizon Massachusetts’ intrastate retail telecommunications services in the Commonwealth of Massachusetts*, Massachusetts Department of Telecommunications and Energy Docket No. DTE 01-31-Phase II, *Order*, April 11, 2003, at 96, 100-101.

<sup>46</sup> / *Id.*

<sup>47</sup> / Verizon Communications, *Investor Quarterly: VZ Second Quarter 2006*, August 1, 2006, at 2.

**Although relatively few ILECs may submit the reports, these large ILECs serve the vast majority of the nation's consumers.**

Rate Counsel finds AT&T's reference to a "small subset of ILECs,"<sup>48</sup> particularly unpersuasive. For example, the fact that three Bells now serve the nation when once there were seven (and the fact that the previously independent companies of Southern New England Telephone Company and GTE have been acquired by BOCs) is the direct consequence of Bells' successful efforts to acquire their potential competitors and to enlarge their home-region footprints. For example, the RBOCs alone provide over 60-million switched access lines, or over 90% of the total switched access lines provided by ILECs nationally.<sup>49</sup> Few, if any, other providers offer affordable basic service to the residential market, and therefore the fact that other providers are not required to submit ARMIS data is not of the same consequence as if AT&T discontinued its ARMIS reporting.

**Price cap regulation does not render reporting irrelevant.**

Furthermore, contrary to AT&T's assertion, price caps are not functioning properly. The attached affidavit, included as Appendix 2 to these comments, and submitted in the Commission's "separations" proceeding, explains why the FCC's price cap system does not eliminate the need for regulatory reporting.<sup>50</sup> Furthermore, as Rate

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<sup>48</sup> / Petition, at 2; see also Petition, at 17.

<sup>49</sup> / The three RBOCs (Qwest, AT&T and Verizon) serve 43,187,308 business lines, including single line, multiline, and payphones. The three RBOCs serve 74,220,993 residential lines. FCC ARMIS Report 43-08. Table III. Access Lines in Service by Customer. Accessed 8/17/2007. Data as of year-end 2006. This data is not available in the local competition report which uses Form 477 data. In the local competition report, data is aggregated over all ILECs and reported on a state basis, as well as providing just residential and business lines, but not lifeline, primary, non-primary, special access lines, for example.

<sup>50</sup> / See Appendix 2, In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint Board, CC Docket No. 80-286, Affidavit of Susan M. Baldwin, on behalf of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel, filed August 22, 2006, paragraphs 43 through 53. See, also, Appendix 1, *Duopoly White Paper*, at Section 2.3,



Counsel demonstrates in the Commission’s “Special Access” proceeding, even under price caps, ILECs are able to extract monopoly rents from consumers and competitors that rely on special access service.<sup>51</sup> Contrary to AT&T’s contention,<sup>52</sup> the need for and importance of the reports do not depend on the existence of rate-of-return regulation.

AT&T refers to the Commission’s “‘theoretical concern’ that price cap LECs might reduce service quality to increase short-term profits,”<sup>53</sup> which, according to AT&T, was part of the rationale for the Commission’s original adoption of service quality reports. AT&T’s argument is unpersuasive because price cap regulation has not eliminated ILECs’ profit-motive, and, indeed, AT&T’s (and other ILECs’) pursuit of video and digital subscriber line (“DSL”) services has created a compelling profit motive to focus resources on unregulated ventures to the detriment of basic service. In other words, the concerns of the Commission are as relevant today as they were when the Commission originally adopted the ARMIS reports.

AT&T further argues that the “Commission’s predictive judgments in 1990 that incentive regulation would increase service quality and spur investment in infrastructure consistently have been proven correct year after year.”<sup>54</sup> AT&T fails to provide

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<sup>51</sup> / *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of the Ratepayer Advocate, June 13, 2005; Reply Comments of the New Jersey Division of the Ratepayer Advocate, July 29, 2005; and *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, FCC WC Docket No.05-25; RM-10593, Comments of the New Jersey Division of Rate Counsel, August 8, 2007, Reply Comments of the New Jersey Division of Rate Counsel, August 15, 2007.

<sup>52</sup>/ Petition, at 3.

<sup>53</sup>/ Petition, at 4, cite omitted. See also, AT&T’s equally unpersuasive assertion that “price cap-regulated carriers have no incentive to sacrifice service quality to increase short-term profits, and that these carriers, like all providers in today’s robustly competitive marketplace, are forced by competition to constantly improve service quality.” Petition, at 10.

<sup>54</sup>/ Petition at 5.

empirical evidence of improvement in its service quality for basic local service, and, indeed, Rate Counsel's preliminary analysis of AT&T's service quality contradicts AT&T's assertion, as the earlier discussion in these comments demonstrate. Furthermore, infrastructure investment is uneven, with some communities benefiting from access to DSL while other regions are left under-served or unserved.

AT&T contends that "the purposes of the rules were long ago mooted by fundamental regulatory and marketplace changes" and that "there is no 'strong connection.'"<sup>55</sup> However, in the wake of substantial industry consolidation and the FCC's UNE TRRO decision, there are fewer prospects than ever for affordable alternatives to basic local telephone service. Therefore the connection is as strong, if not stronger, than when the FCC adopted the rules.

**Form 477, although a valuable report, does not substitute for ARMIS reports.**

AT&T refers to Form 477 as a replacement for ARMIS reports.<sup>56</sup> The Form 477, although useful, is not an adequate substitute for the ARMIS reports. According to the FCC's orders relating to Form 477 filing, actual Form 477s are considered confidential, and are not made available for public inspection.<sup>57</sup> Although data from Form 477s are aggregated and provided in summary form in the *Local Telephone Competition* and *High Speed Services for Internet Access* reports, the underlying data for each company are not made available for analysis.

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<sup>55</sup> / Petition, at 8.

<sup>56</sup> / Petition, at 18-20.

<sup>57</sup> / See *In the Matter of Local Competition and Broadband Reporting*, Report and Order, 15 FCC Rcd 7717 (2000) at paras. 86-96.

In fact, FCC goes to great lengths to protect filers. For example, the instructions for completing the Form 477 contain the statement, “Filers may submit a request that information on Form 477 not be made routinely available for public inspection by so indicating on Line 8 of the Cover Page of the form and on the Certification Statement.”<sup>58</sup> Requesting confidentiality is as simple as checking a box on the form. Additionally, asterisks appear in the *Local Telephone Competition* and *High Speed Access* reports in places where revealing actual data might possibly cause competitive harm to filers.<sup>59</sup>

The FCC is currently party to a legal proceeding involving its refusal to grant the Center for Public Integrity’s request, made through the Freedom of Information Act, to obtain copies of all Form 477s for analysis.<sup>60</sup> Presently, however, in contrast to Form 477 filings, which are closely guarded and typically only available in aggregate and summary form through FCC reports, ARMIS reporting is public. Regulators, consumer advocates, and others will have ready access to virtually no company-specific data if forbearance is granted for ARMIS reporting obligations.

Furthermore, it is possible that data that is filed by a company and designated as competitively sensitive will not be disclosed if it will cause competitive harm even under the Freedom of Information Act (‘FOIA”).<sup>61</sup> The FOIA law includes several exemptions whereby the Commission can refuse to disclose materials under 5 U.S.C. §552(b)(4).

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<sup>58</sup> / FCC, “Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477),” at 13.

<sup>59</sup> / See, for example, the note “Data withheld to maintain firm confidentiality” found in Tables 7, 8, 9, 11, 12, 14, 18, and 19 of the report *Local Telephone Competition: Status as of June 30, 2006*.

<sup>60</sup> / See Public Notice, DA 06-2534, December 15, 2006, “Public Notice To Service Providers Who Filed FCC Form 477s With The Commission And Sought Confidential Treatment Of The Information Submitted” regarding the litigation pending in U.S. District Court for the District of Columbia: *Center for Public Integrity v. Federal Communications Commission*, Civil Action No. 06-1644 (RMC).

<sup>61</sup> / See <http://www.fcc.gov/foia/> outlining Commission policy with respect to FOIA.

Specifically, exemption 4 protects data that are considered trade secrets such as “commercial or financial information obtained from a person and privileged or confidential.” The FCC defines exemption 4 in its 2006 Annual FOIA Report in the following manner:

Exemption 4, 5 U.S.C. § 552(b)(4) – FOIA Exemption 4 permits the withholding of trade secrets and commercial or confidential information that is privileged or confidential. If a FOIA request is filed for such records, the submitter of the records will be given the opportunity to explain how it would be competitively harmed if the records were released. A corollary statute is the Trade Secrets Act, 18 U.S.C. § 1905, which prohibits unauthorized disclosure of all data protected by Exemption 4.<sup>62</sup>

In fact, the Commission has already addressed the issue in its *2000 Data Gathering Order*, adopting streamlined procedures for requesting non-disclosure, adopting a policy of non-disclosure of individual company broadband data even when no request for non-disclosure was made, and generally affirming the Commission’s ability to deny FOIA requests with respect to confidential material.<sup>63</sup>

AT&T proposes that the Commission modify Form 477 to collect infrastructure data from “all providers” rather than use ARMIS reports,<sup>64</sup> however, as described above, the Form 477 data is often deemed confidential and is not as readily available to the public, consumer advocates, and state regulators as is ARMIS data. Rate Counsel certainly supports AT&T’s position that “comprehensive industry-wide data” should be

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<sup>62</sup>/ Federal Communications Commission Freedom of Information Act Annual Report Fiscal Year 2006 (October 1, 2005 to September 30, 2006) available at <http://www.fcc.gov/foia/2006foiareport.pdf>.

<sup>63</sup>/ *In the Matter of Local Competition and Broadband Reporting*, FCC CC Docket No. 99-301, *Report and Order*, rel. March 30, 2000, at paras. 87-91. See, also, *In the Matter of Local Telephone Competition and Broadband Reporting*, FCC CC Docket No. 04-041, *Report and Order*, rel. November 12, 2004, at para. 24.

<sup>64</sup> / Petition, at 7 (emphasis in original).

collected from all carriers. However, AT&T oversimplifies the manner in which this can be achieved. The Commission should not suspend ARMIS reporting in favor of a few changes to Form 477. The high-speed services and local competition report do not provide provider-specific data: this data is based on Form 477, and, is aggregated, AT&T's assertion that Form 477 "already collect much data at a more granular level than ARMIS"<sup>65</sup> is not reassuring because although the data may be collected in a much more granular form, the public does not have access to the data in that form. Meanwhile, in light of ILECs' bottleneck control of essential facilities and in light of their dominance of the local market (particularly the mass market), it is essential to ensure that state and federal regulation is informed by ARMIS information. Rate Counsel relies on ARMIS data in its analysis of Verizon's operations and its participation in state and federal regulatory proceedings.<sup>66</sup>

**ARMIS Report 43-05 is an invaluable tool for regulators to examine basic local telephone service quality.**

The lack of competition for basic local residential service combined with ILECs' pursuit of high-revenue, triple-play customers makes service quality reporting essential. Rate Counsel has previously submitted to the Commission a comprehensive analysis of the cable-telecommunications duopoly and the implications of this duopoly for consumers. As Section 3.10 in Appendix 1 shows, Rate Counsel relied, in part, on ARMIS data.

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<sup>65</sup> / Petition, at 7.

<sup>66</sup> / See e.g., Appendix 1, footnotes 14 and 32, citing Table II "Switched Access Lines in Service" footnote 155, citing Table III "Access Lines in Service by Customer"; Appendix 2, Tables 5, 6, and 7, and Appendix C Tables C-1, C-3, citing Table III "Access Lines in Service by Customer."

ILECs' performance assurance plans ("PAP"), which monitor the service quality of ILECs' wholesale operations, differ in a significant way from ILECs' retail service quality plans, because, when ILECs fail to meet PAP standards, they must pay substantial penalties to CLECs. In contrast, except where state regulators have affirmatively established systems for financial penalties, ILECs need not compensate their retail customers for poor service quality. As a result, ILECs' incentives are to allocate resources to CLECs in a timely manner before addressing inadequate retail service quality.

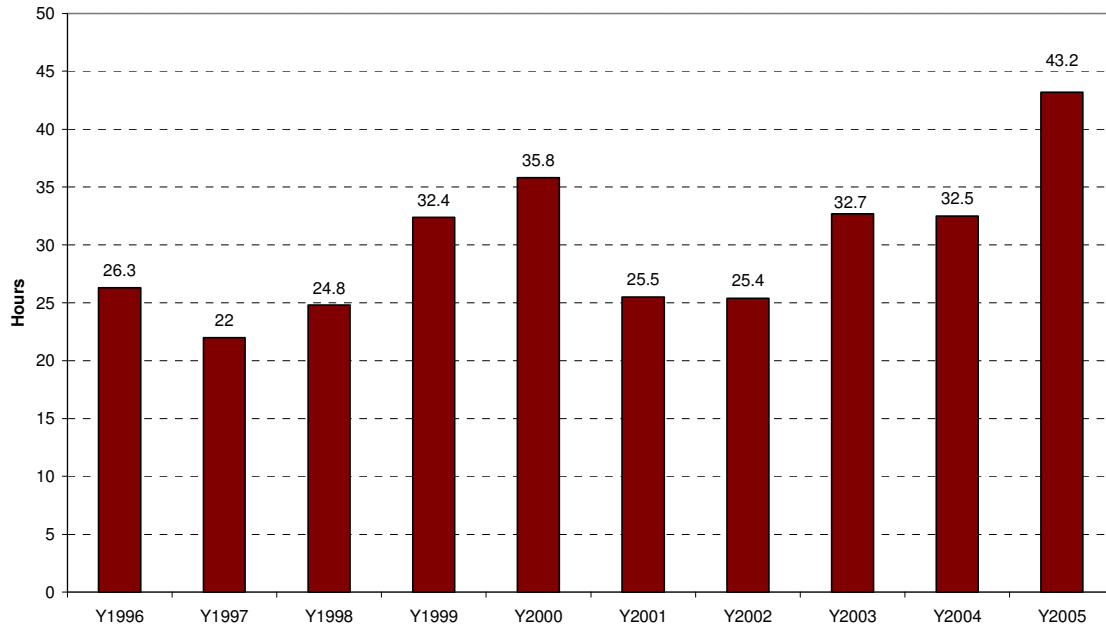
ILECs possess the economic incentive and the opportunity to offer higher quality of service to customers of new, unregulated products than to their customers of regulated and/or noncompetitive products. Specifically, corporate management has the incentive to allocate resources to the triple and quadruple play customers rather than to customers of basic telephone and basic cable service.

For example, Figure 1, which is based on ARMIS data, shows that the quality of basic telephone service, as measured by the timeliness of Verizon's repair of basic dial tone service, has deteriorated in recent years in New Jersey. The "Initial Out-of-Service Interval" refers to the average duration (in hours) that a customer must wait for telephone service to be restored when there is a service outage: the longer the wait, the worse the performance. The following figure shows that Verizon New Jersey's Initial Out-of-Service Interval lengthened in recent years, reflecting a decline in service quality: The 2005 figure, at 43.2 hours, is almost *twice* the 1997 figure.<sup>67</sup>

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<sup>67</sup> / FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 145, Accessed 1/12/2007. The most recent period for which ARMIS data is available is year-end 2005.

**Figure 1**  
**Verizon New Jersey's Service Quality Is Declining**  
**(Initial Out-of-Service Interval: Residential Customers)**

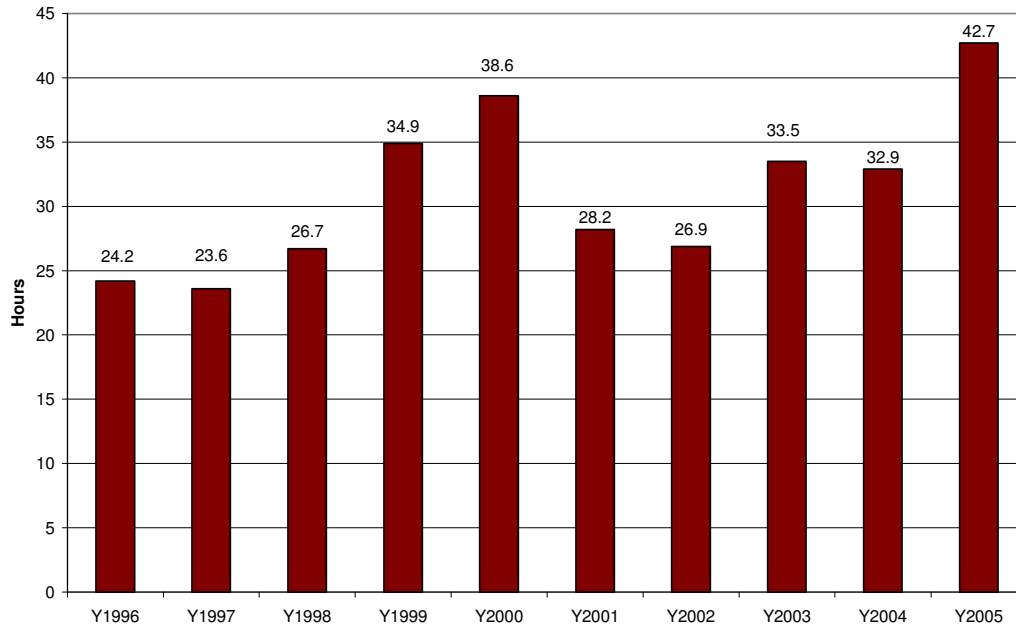


Source: FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 145, Accessed 1/12/2007.

Analysis of “Repeat Out-of-Service Intervals” for Verizon New Jersey shows a similar deterioration of basic telephone service quality over time. The Repeat Out-of-Service Interval refers to the length of time it takes for the telephone company to repair basic service that had an initial unsuccessful repair attempt. Figure 2 shows that the average Repeat Out-of-Service Interval in 2005, at 42.7 hours, was almost 60% longer than just three years earlier.<sup>68</sup>

<sup>68</sup> / FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 149, Accessed 1/12/2007.

**Figure 2**  
**Verizon New Jersey's Service Quality Is Declining**  
**(Repeat Out-of-Service Interval: Residential Customers)**



Source: FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 149, Accessed 1/12/2007.

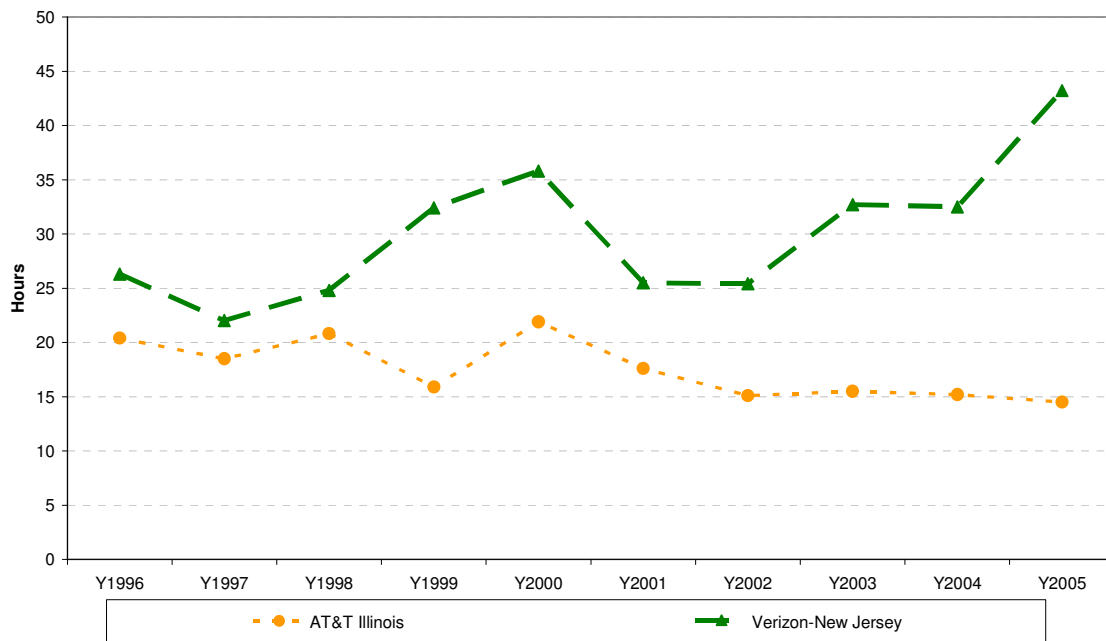
Sufficient competition in the basic local exchange market does not exist to yield adequate service quality. Furthermore, as ILECs divert corporate attention and field personnel to their video business, service quality will likely deteriorate further.<sup>69</sup> Therefore, safeguards are essential to protect consumers from the improper subsidization of new services with resources that should be assigned to basic regulated ones.

<sup>69</sup> / Verizon's planned sale of its landline business in the three northern New England states provide further evidence of the vulnerability of non-FiOS customers to Verizon's corporate focus on new lines of business. In Maine, New Hampshire, and Vermont, FairPoint Communications Inc. (the company that intends to purchase Verizon's operations) considers itself a "rural, small-urban focused company" and considers northern New England customers its "bread and butter customers." "Verizon to sell lines in N.H., Vt., and Maine," Carolyn Y. Johnson, *Boston Globe*, C1, January 17, 2007, quoting Walt Leach, executive vice president of corporate development for Fairpoint. By contrast, in New Jersey, rural communities' needs will likely take the back seat to Verizon's FiOS focus. Furthermore, Verizon's efforts to obtain further deregulation of its noncompetitive services will exacerbate this issue further. See, e.g., *In the Matter of the Board's Investigation Regarding the Reclassification of Competitive Local Exchange Carrier (CLEC) Services as Competitive*, New Jersey Board of Public Utilities Docket No. TX06120841, Joint Direct Testimony of William E. Taylor and Paul B. Vasington, on behalf of Verizon, January 9, 2007.



By way of comparison, as Figure 3 and Figure 4 show, based on the same two metrics, and over the same period of time, AT&T's service quality in Illinois exceeds that of Verizon's in New Jersey. The service quality gap has widened over time: Verizon New Jersey's response time to repair requests was both shorter and more in line with that in Illinois in the mid-to-late 1990s than it is today.

**Figure 3**  
**AT&T in Illinois Outperforms Verizon in New Jersey**  
**(Initial Out-of-Service Interval: Residential Customers)**

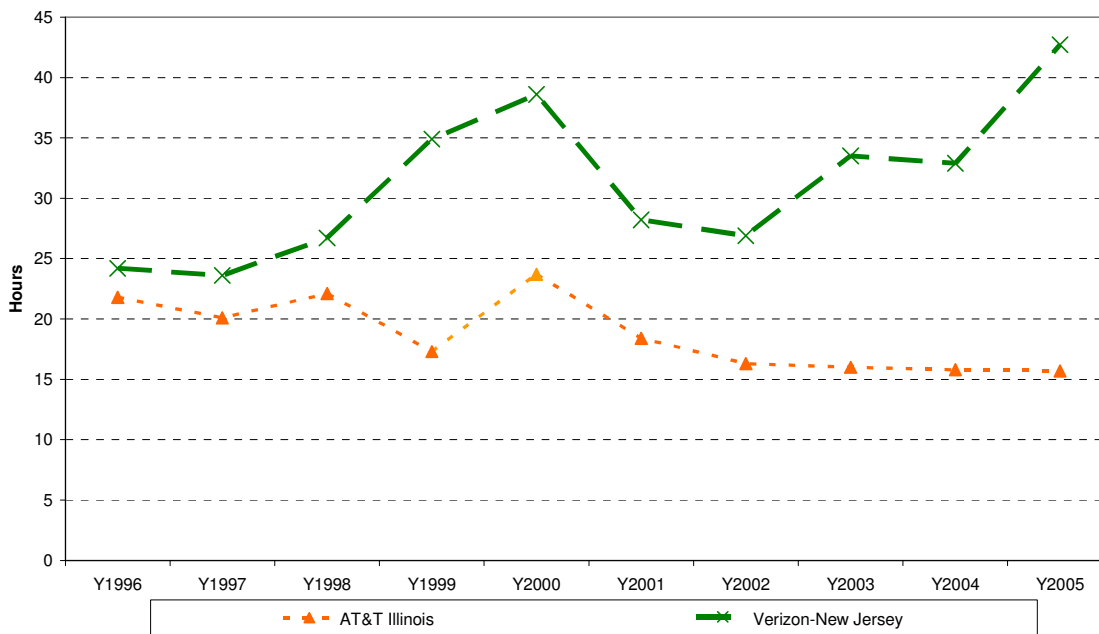


Source: FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 145, Accessed 1/12/2007.

Figure 4 shows a similar pattern of inferior service quality in New Jersey relative to Illinois, as measured by customers who have repeat problems on the same line. The evidence suggests that Verizon New Jersey is allocating insufficient resources (*e.g.*, field technicians) to provide service for its base of traditional telephone customers. As

Verizon continues to pursue the cable business, its financial incentives will continue to jeopardize basic telephone service quality.

**Figure 4**  
**AT&T in Illinois Outperforms Verizon in New Jersey**  
**(Repeat Out-of-Service Interval: Residential Customers)**



Source: FCC Report 43-05 ARMIS Service Quality Report, Table II. Installation and Repair Intervals (Local Service), Row 149, Accessed 1/12/2007.

A long history of financial incentives for providing adequate service quality likely explains the better service quality that Illinois households receive relative to their counterparts in New Jersey. An integral component of the original price cap plan that governed Ameritech - Illinois (now AT&T), approved by the Illinois Commerce Commission in 1994, was a service quality offset of as much as two percentage points a year to the “X” factor if the company failed to meet all of its service quality performance

standards.<sup>70</sup> Several years later, as a result of state-enacted legislation, telecommunications carriers were directed to provide customer credits for (1) out-of-service over 24 hours; (2) installation occurring after five days; and (3) missed appointments.<sup>71</sup> By comparison, Verizon New Jersey has not had and continues to lack a compelling financial incentive to maintain and/or improve its service quality. AT&T's Petition, if granted, would severely undermine the ability of state and federal regulators to examine and to compare service quality among jurisdictions, and to assess the impact of financial incentives on ILECs' retail service quality.

ARMIS Report 43-07 allows regulators to monitor the evolving mix of technologies used to provide telephone service. For example, Table II "Transmission Facilities" shows the number of kilometers of plant by type of plant (copper, fiber, or other), as well as the number of DS1s in service, and the number of subscriber lines capable of ISDN service. The data reveal that while Verizon New Jersey has transformed its transmission facilities from 18.9% fiber in 2000 to 27.3% fiber in 2006, AT&T's Southwestern – Arkansas has increased fiber to only 11.6% of its total facilities.<sup>72</sup> These data, and others like them reported in Form 43-07, inform regulators.

Rate Counsel used 43-08 Table II "Switched Access Lines in Service" to find comparable data for Verizon New Jersey and Embarq Corporation in New Jersey, which

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<sup>70</sup> / *Petition to Regulate Rates and Charges of Noncompetitive Services Under an Alternative Form of Regulation*, Illinois Commerce Commission Docket No. 92-0448/93-0239 Consol., rel. October 11, 1994, at 56-59.

<sup>71</sup> / 83 Ill. Adm. Code 732, effective August 1, 2001; Illinois Commerce Commission, Docket No. 98-0252, Illinois Bell Telephone Company Application for review of alternative regulation plan; Docket No. 98-0335, Illinois Bell Telephone Company petition to Rebalance Illinois Bell Telephone Company's Carrier Access and Network Access Line Rates; Docket No. 00-0764, Citizens Utility Board and the People of the State of Illinois -v- Illinois Bell Telephone Company, Verified Complaint for a Reduction in Illinois Bell Telephone Company's Rates and Other Relief, Order, December 30, 2002, at 196.

<sup>72</sup> / FCC Report 43-07, Table II Transmission Facilities, rows 320 – 323.

data was unavailable from any other source. These data were particularly important for showing the relative size of the companies' subscriber bases. In addition, Rate Counsel used Report 43-08, Table III "Access Lines in Service by Customer," together with BOC annual reports, to demonstrate that traditional telephone companies are rapidly shifting focus, and resources, away from traditional telephone services.

**AT&T has failed to demonstrate that its Petition meets the Act's three-part test.**

Section 10 of the Act includes a three-part test that governs whether the Commission shall forbear from applying any regulation or provision of its act. In broad terms, the three-part test requires the Commission to address the following:

1. Is the regulation necessary to ensure that the rates for the relevant services are just and reasonable?
2. Is the enforcement of the regulation necessary to protect consumers?
3. Would forbearance from applying the regulation be consistent with the public interest?<sup>73</sup>

As explained recently by the Commission:

The Commission is obligated to forbear under section 10(a) only if all three elements of the forbearance criteria are satisfied. Thus, the Commission "could properly deny a petition for forbearance if it finds that any one of the three prongs is unsatisfied." As discussed below, we find that the Core Forbearance Petition does not meet certain of the statutory forbearance criteria and, accordingly, we deny the petition.<sup>74</sup>

AT&T has failed to demonstrate that its Petition satisfies this three-part test.

Furthermore, as Rate Counsel's comments demonstrate, forbearance from applying the

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<sup>73</sup>/ 47 U.S.C. § 160.

<sup>74</sup>/ *In the Matter of Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-100, *Memorandum Opinion and Order*, July 26, 2007, notes omitted. See also *id.*, at note 45, which states: "See *Cellular Telecommunications & Internet Assoc. v. Federal Communications Commission*, 330 F.3d 502, 509 (D.C. Cir. 2003) (explaining that the three prongs of section 10(a) are conjunctive and that the Commission could properly deny a petition for failure to meet any one prong)."

ARMIS reporting requirements would be inconsistent with the public interest. Finally, Rate Counsel submits that AT&T's unsupported assertions coupled with the lack of empirical support simply are insufficient to sustain AT&T's burden of proof. Furthermore, Section 10 is constitutionally infirmed in that it violates the separations of powers, equal protection, and the 10th and 11th amendment. Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10th Amendment, and 11th Amendment as outlined in detail in our Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

### **III. CONCLUSION**

For the foregoing reasons, the Commission should deny AT&T's petition for forbearance. The Petition is flawed procedurally and also fails on its merits. AT&T has not sustained its burden of proving that the Petition is consistent with the public interest. The reports for which AT&T seeks forbearance relate directly to regulators' and consumer advocates' ability to protect consumers. Notwithstanding the fact that the petition is without merit and should be denied by the Commission based on the reasons discussed above, Rate Counsel renews the arguments and incorporates those arguments attached hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority. Specifically any exercise of the forbearance authority contained in Section 10 of the Act violates separation of powers, equal protection, 10<sup>th</sup> amendment, and 11<sup>th</sup> amendment as outlined in detail Rate Counsel's Ex

Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313) that are incorporated by reference herein.

Respectfully submitted,

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